

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KRISTINE DAVIS

Claimant

VS.

USD 233

Self-Insured Respondent

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Docket No. 1,051,464

ORDER

STATEMENT OF THE CASE

Claimant requests review of the December 15, 2011, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Kevin J. Kruse, of Overland Park, Kansas, appeared for claimant. Kip A. Kubin, of Leawood, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found claimant failed to prove she injured her left upper extremity as a direct and natural consequence of her original work-related injury to the right hand. The ALJ denied claimant's request for treatment for her left hand and left forearm.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 14, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends she sustained injury to her left hand and left forearm as a direct and natural consequence of authorized medical treatment, specifically work hardening, she received for her right hand injury.

Respondent maintains the Board does not have jurisdiction over the subject matter of claimant's request for review and that this appeal should accordingly be dismissed. If the Board finds it has jurisdiction, respondent argues the ALJ was correct in finding that claimant failed to meet her burden of proof that she injured her left hand and forearm as a direct and natural consequence of the original work-related injury to the right hand.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the subject matter of this review?
- (2) If so, is claimant's left forearm injury the direct and probable consequence of claimant's right hand injury?

FINDINGS OF FACT

Claimant was age 65 when she testified at the preliminary hearing. She is right hand dominant. On the date of her accident she was working at Heartland Learning Center, one of respondent's schools, as a preschool teacher. On November 23, 2009, claimant tripped on a water absorption floor mat in the school's foyer and fell. As she fell her right hand struck a metal door frame. Claimant sustained bruises and abrasions to her knees and elbows, but those injuries healed. Claimant also injured her right hand. Respondent sent claimant to Olathe Occupational Medicine. She was diagnosed with a fracture of the right fifth metacarpal and was referred to Dr. Anne R. Rosenthal, an orthopedic surgeon. Claimant's initial contact with Dr. Rosenthal was on the date of accident. Claimant complained to Dr. Rosenthal about numbness and tingling in her right hand. The fracture of claimant's right hand was non-displaced and in fairly good alignment. As a result, Dr. Rosenthal decided to manage the fracture non-surgically. Dr. Rosenthal provided claimant with a hard-molded splint for her right hand and recommended restrictions of no use of the right hand and right arm.

Claimant was in the splint for 15 weeks. During that time she continued to work for respondent within Dr. Rosenthal's restrictions. She no longer worked as a preschool teacher. She was placed in a light duty position assisting kindergarten teachers with testing and classroom activities. She performed a variety of activities, including cutting paper with scissors, stapling, tearing paper, and making copies. She performed all her duties at work and at home with her left hand only. On March 3, 2010, Dr. Rosenthal discontinued use of the splint and modified claimant's restrictions to no lifting over one pound with the right hand and right arm. Dr. Rosenthal thereafter gradually increased the amount claimant was allowed to lift with her right hand and arm. Claimant continued to work for respondent within the restrictions of Dr. Rosenthal.

On approximately May 26, 2010, claimant started a work hardening program, which commenced with a functional capacities evaluation. The work hardening was prescribed by Dr. Rosenthal, the authorized treating physician, to improve claimant's right hand function, especially strength and range of motion. Work hardening required claimant's attendance five days per week, four hours per day, for approximately one month. The exercises included performing fine motor skill activities, such as moving pegs to and from a pegboard, as well as lifting boxes with weights inside. The work hardening also required lifting weights with pulley-like equipment and using a machine that required rowing or bicycling movements. Claimant said she preferred to use her left hand over her right hand during these exercises because her right hand was not as strong as her left. During the work hardening therapy, claimant began experiencing pain in both of her wrists, extending

to both shoulders. She also felt tingling in her fingers bilaterally. Claimant denied experiencing those symptoms before her accident.

Claimant testified she reported the symptoms in her right and left hands and arms to Dr. Rosenthal in an office visit on June 7, 2010. Dr. Rosenthal's note bearing that date documents claimant's complaints of right hand numbness and tingling but there is no mention of left-sided symptoms. The same note indicated: "It sounds like she is having some carpal tunnel-type symptoms from the use of her hand in therapy."¹ In a letter to respondent's insurance carrier dated June 29, 2010, Dr. Rosenthal stated that claimant complained of "new onset hand numbness at her June 7, 2010, office visit that she states began three weeks prior to that visit."² Dr. Rosenthal noted that claimant had complained of right hand numbness and tingling when she first saw claimant on November 23, 2009. Dr. Rosenthal related those symptoms to claimant's initial right hand trauma. In her report dated June 29, 2010, Dr. Rosenthal expressed her opinion that claimant's right carpal tunnel symptoms were related to claimant's right metacarpal fracture and to the work hardening therapy prescribed to treat the injured right hand.

In the record of claimant's office visit with Dr. Rosenthal on July 7, 2010, it is documented she told Dr. Rosenthal that for the past three weeks she had been having left arm and left hand tingling and pain. Dr. Rosenthal stopped the work hardening at that time. Dr. Terrence Pratt, a colleague of Dr. Rosenthal's, performed EMG/NCV testing of claimant's right upper extremity, but the same testing for her left arm was not authorized by respondent. The EMG of claimant's right upper extremity was positive for carpal tunnel syndrome. Claimant and Dr. Rosenthal discussed surgery on her right hand/forearm. Claimant opted not to have surgery at that time, stating she was concerned about the amount of time she would miss from work.

Dr. Rosenthal's chart entry dated August 9, 2010, states: "I have reviewed her therapy notes and she did complain of numbness and tingling in the left hand and arm as well as the right and that is why they could not proceed with further work conditioning."³

In a September 14, 2010, report from Dr. Rosenthal to respondent, Dr. Rosenthal stated that claimant's left hand problems were first reported to her on July 7, 2010, eight months after the work-related injury. Dr. Rosenthal stated that claimant began to use her right hand on March 3, 2010, and she did not think claimant's left hand symptoms were caused by overuse. Dr. Rosenthal also opined: "In relation to her November 23, 2009,

¹ P.H. Trans., Cl. Ex. 1 at 14; Resp. Ex. A at 28.

² *Id.*, Cl. Ex. 1 at 12, Resp. Ex. A at 30.

³ *Id.*, Cl. Ex. 1 at 6, Resp. Ex. A at 34.

vocationally related event, I believe only the right carpal tunnel type symptoms are related and not her left hand symptoms.”⁴

Claimant was released from treatment by Dr. Rosenthal on November 1, 2010, with no permanent restrictions. Claimant was directed by Dr. Rosenthal to wear her right hand splint as needed.

At the request of her counsel, claimant was examined by Dr. P. Brent Koprivica on July 27, 2011. Claimant told Dr. Koprivica that she associated her right and left hand numbness and tingling with the work hardening program. Dr. Koprivica concluded that claimant developed symptoms of bilateral carpal tunnel syndrome as a direct and natural consequence of her work-related injury to the right hand and the care and treatment necessitated by that work injury. To support his causation opinions, Dr. Koprivica placed emphasis on claimant’s “ongoing protective behaviors” and “compensatory use activities,” in which claimant increased the use of her left upper extremity because of her right hand injury.⁵ Dr. Koprivica stated the bilateral carpal tunnel syndrome would be a “causal consequence of the November 23, 2009, work injury.”⁶

Claimant is currently having pain in both wrists starting just below the junctions between her hands and forearms, extending distally through her thumbs, index and middle fingers. She has noticed the pads on both hands have gotten smaller and she has lost some tissue in both of her thumbs. Her left hand remains stronger than her right hand. Claimant no longer has complaints in her shoulders. Claimant has difficulty picking up and holding things, opening things with her hands, and opening doors. She also has dropped things, including chairs in the classroom. At the preliminary hearing, claimant asked the ALJ for authorization for treatment to both upper extremities.⁷

The ALJ had previously entered an agreed preliminary Order dated August 4, 2010, which provides: “Dr. Anne Rosenthal is designated as the authorized treating physician to treat any conditions that were caused or aggravated or arose as a consequence of her accident of November 23, 2009.”

⁴ P.H. Trans., Cl. Ex. 1 at 4, Resp. Ex. A at 39.

⁵ P.H. Trans., Cl. Ex. 2 at 10, 11.

⁶ P.H. Trans., Cl. Ex. 2 at 11.

⁷ Respondent’s counsel stated at the preliminary hearing that his client is willing to provide treatment with Dr. Rosenthal for the right carpal tunnel syndrome. P.H. Trans. at 3, 4.

PRINCIPLES OF LAW

The Board has only limited jurisdiction to review preliminary hearing findings. K.S.A. 44-534a(a)(2) provides the Board may review those preliminary findings pertaining to the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. K.S.A. 2010 Supp. 44-551(i)(2)(A).

An employer is liable to pay compensation to an employee where the employee sustains personal injury by accident arising out of and in the course of employment.⁸ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁹ An injury resulting from the treatment a claimant received for a work-related accident is compensable.¹⁰

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Logsdon*,¹¹ the Kansas Court of Appeals reiterated the rules found in *Jackson*¹² and *Gillig*¹³:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹⁰ See *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

¹¹ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

¹² *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹³ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,¹⁴ the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁶

ANALYSIS

The Board has jurisdiction of the issue raised by claimant in this review. The ALJ's order is a preliminary hearing order. Although it is not alleged that the ALJ exceeded his jurisdiction in entering the preliminary hearing order, the issue raised on appeal is reviewable by the Board because the issue directly concerns whether claimant sustained injury to her left hand and left forearm as a natural and probable consequence of claimant's right hand injury or as a consequence of a separate, intervening trauma unconnected with the right hand injury. The issue raised before the Board falls squarely within categories set forth in K.S.A. 44-534a(a)(2), specifically, "whether the employee suffered an accidental injury" and "whether the injury arose out of and in the course of the employee's employment." The Board has considered this jurisdictional issue numerous times and has consistently ruled that the Board has jurisdiction to review a preliminary order under these circumstances.¹⁷

¹⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494 (2007).

¹⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁶ K.S.A. 2010 Supp. 44-555c(k).

¹⁷ See, e.g., *Compton v. Burnett Automotive, Inc.*, No. 1,050,026, 2010 WL 3093232 (Kan. WCAB July 30, 2010); *Vick v. State of Kansas*, No. 1,033,888, 2010 WL 2937769 (Kan. WCAB March 2, 2010); *Reese v. Beverly Healthcare Pittsburg*, No. 1,024,449, 2007 WL 1445602 (Kan. WCAB September 18, 2007).

The undersigned Board member is also persuaded that claimant has, based on the evidence currently in the record, sustained her burden of proving that her left hand and left forearm injuries are a direct and natural consequence of claimant's November 23, 2009, right hand injury.

As a result of claimant's accident in November 2009, she was diagnosed with a fracture of her right fifth metacarpal. At that time, claimant had symptoms of numbness and tingling in her right hand which apparently diminished after the initial trauma. Claimant was placed in a right short arm splint from November 23, 2009, until March 3, 2010. During that period, claimant was under a restriction of no use of the right hand and arm. On March 3, 2010, claimant's restriction was changed to no lifting over one pound with the right arm and hand. On May 10, 2010, the restriction was changed to no lifting over 5 pounds, and on June 7, 2010, the restriction changed again to no lifting over 20 pounds. When claimant's work hardening commenced May 2010, she was under a restriction of no lifting over five pounds with the right hand and arm, and while the work hardening was ongoing, claimant's lifting restriction became no lifting over 20 pounds.

Dr. Rosenthal intended the work hardening therapy to "aggressively" work on increasing strength and range of motion.¹⁸

The preponderance of the credible evidence establishes that claimant experienced carpal tunnel symptoms—pain, numbness, and tingling in the hands and forearms—during the approximate one-month period she was engaged in work hardening. On June 7, 2010, claimant expressed to Dr. Rosenthal that she was having a recurrence of right hand tingling and numbness which started three weeks before. Dr. Rosenthal commented: "It sounds like she is having some carpal tunnel-type symptoms from the use of her hand in therapy."¹⁹ Dr. Rosenthal's records reflect that on July 7, 2010, claimant told Dr. Rosenthal that she was having left arm tingling and pain which had started three weeks previously.²⁰ In Dr. Rosenthal's chart note dated August 9, 2010, the doctor states that she had reviewed claimant's physical therapy records and the records document claimant's complaints of numbness and pain in the left hand and arm as well as the right.

Claimant alleges that her left hand/arm complaints, as well as her similar complaints on the right, were caused by the work hardening activities in which claimant participated for about one month beginning in May 2010. The record supports that allegation. The allegation is consistent with claimant's testimony and with what claimant told Dr. Koprivica. It is also consistent with what claimant told Dr. Rosenthal. Claimant's allegation of bilateral injuries during work hardening is, as Dr. Rosenthal specifically notes, documented in the

¹⁸ P.H. Trans., Resp. Ex. A at 25.

¹⁹ *Id.*, Cl. Ex. 1 at 14, Resp. Ex. A at 21.

²⁰ *Id.*, Cl. Ex. 1 at 10, Resp. Ex. A at 31.

therapy notes. It is not disputed that the work hardening, which was prescribed by the authorized physician to treat the right hand, required repetitive use of both upper extremities for four hours per day, five days per week. Claimant tended to use her left hand more than the right hand because the right hand was not as strong.

It seems highly improbable that claimant just happened to experience a recurrence of her right carpal tunnel symptoms and the development of her left carpal tunnel symptoms during a period in which claimant was engaging in physically vigorous, repetitive activities with the upper extremities required by the work hardening. During the entire period claimant engaged in the work hardening program, she was under restrictions on lifting with her right hand and arm. It is undisputed that during the same period claimant was experiencing weakness and lack of normal range of motion in the right hand. It follows that during work hardening claimant favored her right hand and arm because the left side felt stronger.

The opinions of Dr. Rosenthal and Dr. Koprivica obviously differ regarding causation of the symptoms in claimant's left upper extremity. Unfortunately, neither physician provides much in the way of rationale for their opinions. Dr. Rosenthal seems to emphasize that claimant's left-sided complaints did not develop for some seven to eight months following the right hand injury. However, if the work hardening program did in fact cause claimant's left upper extremity symptoms, then it is reasonable to conclude that the symptoms on the left would not begin until after the work hardening commenced. The same reasoning applies to the right-sided complaints. There was no recurrence of the right carpal tunnel symptoms for a period of six or seven months—until the work hardening program began.

Dr. Koprivica concludes that claimant's participation in the work hardening program caused or contributed to the development of claimant's bilateral carpal tunnel symptoms. That evidence, along with claimant's testimony and the other medical evidence, persuades this Board Member that claimant sustained her burden of proving the injury to her left upper extremity was the natural and probable consequence of claimant's November 23, 2009, accidental injury and the work hardening program prescribed to treat it. An injury which occurs during participation in a work hardening program or functional capacity evaluation made necessary by a previous work-related injury is a direct and natural result of the previous injury.²¹

CONCLUSION

(1) The Board has jurisdiction to review the ALJ's finding that claimant's left hand and arm injury is not a natural and probable consequence of claimant's right hand injury.

²¹ *Frazier v Mid-West Painting, Inc.*, 268 Kan. 353, Syl. ¶ 2, 995 P.2d 855 (2000).

(2) Claimant has sustained her burden of proving that it is more probably true than not true that claimant's left hand and arm injury was a natural and probable consequence of claimant's right hand injury, not the consequence of a separate, intervening accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 15, 2011, is hereby reversed and the claim is remanded to the ALJ for further orders and/or proceedings consistent with this order.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Kevin J. Kruse, Attorney for Claimant
Kip A. Kubin, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge